

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

SBM SITE SERVICES, LLC	
and	
JOSE LA SERNA, an Individual	Cases: 20-CA-157693
and	
ESTHER QUINTANILLA, an Individual	20-CA-157705
and	
ADILIO PRIETO, an Individual	20-CA-157761
and	
LUZ DARY DUQUE LOPEZ, an Individual	20-CA-157884

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**RESPONDENT'S REPLY IN SUPPORT OF ITS  
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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## **INTRODUCTION**

SBM terminated the employment of both Esther Quintanilla and Adilio Prieto for similar misconduct: they both lied to their employer to avoid discipline unrelated to any protected activity. Quintanilla stipulated that she willfully lied about an on-the-job accident to avoid lawful discipline; Prieto lost his job for falsifying a log book and then falsely claiming another employee instructed him to make the falsification. The ALJ and the General Counsel ignore this misconduct, conjure up anti-union motivations where none exist, and ask the Board to set a dangerous precedent. If employers cannot lawfully terminate employees who lie to avoid discipline, then no employment decision is safe from the government second-guessing an employer. The ALJ's decisions as to Quintanilla and Prieto (as well as the remedy for Jose La Serna) should be reversed.<sup>1</sup>

### **I. ESTHER QUINTANILLA**

With regard to Quintanilla, the ALJ's decision and General Counsel rely on contorted arguments to avoid the import of Quintanilla's severe misconduct—SBM acted reasonably and without pretext when it terminated Quintanilla's employment. Quintanilla did not testify at the hearing, although she had the opportunity to do so.<sup>2</sup> Instead, the Parties stipulated that she (1) willfully provided false information to avoid lawful discipline; and (2) was given multiple opportunities to fix her misstatements, but refused. (Tr. 669.) After a detailed investigation by an off-site human resources professional, SBM confirmed Quintanilla's misconduct and concluded that it warranted her termination. It not only violated SBM's policies, but also amounted to conduct no reasonable employer would expect of its employees.

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<sup>1</sup> SBM's Memorandum in Support of Exceptions to the ALJ's Decision details the numerous errors on which the ALJ's decision rests. It also details why the remedy for Jose La Serna should be reversed. This Reply simply addresses some of the more serious errors on which the General Counsel mistakenly urges the Board to affirm the ALJ's decision.

<sup>2</sup> Both the ALJ's decision and General Counsel's Answering Brief ask the Board to make inferences in favor of Quintanilla, a witness who chose not to participate in the hearing. This is improper. *See International Union, United Auto Workers v. N. L. R. B.*, 459 F.2d 1329, 1336 (D.C. Cir. 1972) (holding that "when a party has relevant evidence within its control which it fails to produce, that failure gives rise to an inference that the evidence is unfavorable to the party.").

**A. SBM Did Not Discipline Quintanilla Twice For The Same Misconduct And The Timing Of Quintanilla's Discipline Is Not "Highly Suspicious"**

Although they dispute the scope, even the General Counsel and the ALJ admit that Quintanilla's misconduct warranted discipline. Instead, both argue that SBM somehow disciplined Quintanilla twice for the same misconduct. (*See* Answering Brief p. 20.) This argument is contrary to the record.

The following facts are not in dispute:

1. Quintanilla willfully provided a false statement regarding the date of an injury to avoid lawful discipline; she was given multiple opportunities to retract her false statement. (Tr. 669-671.)
2. On March 26, 2015, before Quintanilla was elected shop steward or engaged in any other protected activity, SBM suspended her pending an HR investigation, which would determine the appropriate discipline. (GX 5; Tr. 131, 483.)
3. SBM's Human Resources Director, Janice Periolat, was the decision-maker with respect to Quintanilla's termination. (ALJD 21:34.) After Quintanilla's March 26 suspension, Periolat commenced her investigation. (ALJD 21:7; Tr. 934-938, 942, 1248-1250; RX 91.) At that time, Periolat had not previously investigated Quintanilla's misconduct or come to any conclusions about whether Quintanilla was lying to avoid lawful discipline.
4. Periolat did not work at Quintanilla's facility; she worked off site at another facility and was responsible for SBM's world-wide workforce. (Tr. 712, 1232.)
5. Quintanilla attended a labor management meeting on April 7, 2015, at which time she had the chance to discuss her misconduct and fix her false statements. (Tr. 160-161, 163-164; *see* Tr. 1253, 1255-1256.)
6. On April 9, 2016, Quintanilla's employment was terminated.

There is no evidence that SBM disciplined Quintanilla twice for the same misconduct. SBM did exactly what it should have done in this situation. It identified Quintanilla's misconduct—lying to avoid discipline—which amounted to a terminable offense. But rather than rush to judgment, SBM took time to investigate Quintanilla's misconduct before making a termination decision.<sup>3</sup> The ALJ may have conducted an investigation differently or even settled on a different level of

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<sup>3</sup> A failure to conduct an investigation before terminating Quintanilla could have been used against SBM.

discipline. But it is not the ALJ's job to act as a super human-resources department. *Hoffman Fuel Company of Bridgeport*, 309 NLRB 327, 329 (1992) ("It is not within the province of the Board merely to substitute its judgement for that of the employer as to what constitutes appropriate and reasonable discipline."); *Detroit Newspaper Agency v. NLRB*, 435 F.3d 302, 310 (D.C. Cir. 2006) (noting that the Board may not act as a personnel manager, supplanting its judgment on how to respond to unprotected, insubordinate behavior for those of an employee). SBM's measured, deliberate conduct should be encouraged, and in no way suggests that SBM punished Quintanilla for the same misconduct, much less violated the Act.

**B. SBM Did Not Exhibit Animus Toward Quintanilla's Protected Activity**

Further, there is no evidence that SBM harbored any ill will toward Quintanilla or terminated her for any other reason than her misconduct. In an attempt to find pretext where none exists, the General Counsel posits that the only thing that changed between Quintanilla's suspension and her termination was her election to shop steward. (Answering Brief 17.) This is false. Between her suspension and termination two key things occurred that resulted in her discharge: (1) the decision-maker, Periolat, investigated Quintanilla's misconduct, and (2) Quintanilla continued to refuse to retract her false statements, despite being given multiple opportunities to do so. (ALJD 21:34; Tr. 1250-1252). For these reasons Quintanilla was terminated on April 9, 2015. There is no evidence of any ulterior motive, that Periolat, Kahn, or anyone else at SBM had it in for Quintanilla, or even viewed her as active in the union.<sup>4</sup> The only conclusion supported by the evidence is that Quintanilla lost her job because of her admitted willful misconduct.

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<sup>4</sup> The General Counsel tries to impute anti-union animus on Periolat because she was also involved in the investigations of Luz Dary Duque Lopez and Jose La Serna. This should have no effect on how the Board analyzes Periolat's conduct with respect to Quintanilla. Although ALJ found for La Serna, it held that neither SBM nor Periolat violated the Act when it terminated Lopez. (ALJD 45-47.)

**C. None Of The Comparators Cited By The General Counsel Engaged In Willful Misconduct To Avoid Lawful Discipline**

Further, the comparators to which the General Counsel points as evidence of pretext, should be disregarded. As detailed in SBM's Exceptions Brief, to be probative of pretext, comparators generally must involve the same or substantially similar misconduct, involve the same decision-maker, and address similarly situated persons. *Walker Stainless Inc.*, 334 NLRB 1260, 1262 (2001); *Memc Elec. Materials, Inc. & Int'l Ass'n of Machinists & Aerospace Workers, Afl-Cio*, 342 NLRB 1172, 1198 (2004); *New Otani Hotel & Garden*, 325 NLRB 928, 942 (1998).

Here, the General Counsel and ALJ attempt to analogize Quintanilla's misconduct to individuals who engaged in significantly less severe conduct than Quintanilla. None of the alleged comparators engaged in admitted willful misconduct to avoid lawful discipline, and none involved Periolat as a decision-maker. (*See* Exceptions Brief p. 39-41.) Indeed, as Periolat testified, she had never encountered a situation like Quintanilla's. (Tr. 1257.) The comparators on which both the General Counsel and ALJ rely represent a continued misunderstanding of why Quintanilla was terminated. Periolat explained that Quintanilla "lied, [was] given an opportunity to correct that lie, for it just to be a mistake, she refused." (Tr. 1254-1255.) As the Parties stipulated, this conduct amounts to willful false statements intended to avoid lawful discipline. (Tr. 669.) Quintanilla's misconduct easily surpassed that of the comparator in the record, and destroys any pretext argument.

The record simply does not support a finding that Quintanilla was terminated for pretextual reasons. She did not testify at the hearing, admitted to lying to avoid lawful discipline, and SBM discharged her only after giving her multiple chances to recant her false statements. SBM's treatment of Quintanilla did not violate the Act and the ALJ's decision should be reversed.

## **II. ADILIO PRIETO**

The ALJ's decision with respect to Prieto should also be reversed. The General Counsel's Answering Brief misrepresents the record evidence and claims that SBM "exaggerated" the notion that GMP areas are more sensitive to discipline and cleaning in order to justify Prieto's suspension and termination. Nothing could be further from the truth.<sup>5</sup>

### **A. Prieto Committed Terminable Offenses Regardless Of Any Protected Activity**

Prieto lost his job for falsifying a document (the log books) and providing false or misleading information (lying about the reasons he falsified the log books), both of which violated his job responsibilities and SBM's business practices. (Tr. 1264-1265; 1018-1019; 1023-1024; RX 46-35.) Particularly given this misconduct, the evidence conclusively shows that SBM suspended and terminated Prieto's employment consistent with its policies and past practice. Further, the General Counsel does not, and cannot, dispute that the ALJ failed to analyze whether SBM would have terminated Prieto in the absence of his union activity because the ALJ simply did not engage in any such analysis. Prieto's termination was lawful and the charges related to his termination should be dismissed.

### **B. GMP Employees Are Held To A Higher Standard Than Standard Janitorial Employees**

SBM employees in the Good Manufacturing Practices ("GMP") department are responsible for cleaning and sanitizing critical spaces where life-saving medications are tested and manufactured. (Tr. 715-716, 1013-1014, 1104-1105.) In its Answering Brief, the General Counsel minimizes the significance of Prieto's position as a GMP Technician ("GMP Tech") in an attempt to convince the Board that termination was not appropriate given Prieto's conduct. Prieto's own testimony, however, demonstrates that (1) GMP Techs are held to a much higher standard than

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<sup>5</sup> A simple search of "Good Manufacturing Practices" on Google elicits multiple results regarding the regulatory standards ensuring pharmaceutical quality.

regular janitorial employees and that (2) he was fully aware of the legal significance of signing Genentech's log books.

Specifically, Prieto admitted during the hearing that he was required to go through special training to become a GMP Tech. Training began with classroom training, included a knowledge assessment examination and ended with lengthy on-the-job training. (Tr. 406-411.) He also admitted that as a GMP Tech who was paid a higher hourly rate than non-GMP employees, he understood the importance of signing log books to verify that certain critical areas and/or rooms had been cleaned. (Tr. 414-416.) Prieto further conceded that he was fully aware that signing Genentech's log books was similar to signing a legal document reviewable by government agencies. (Tr. 414.) Finally, Prieto admitted that if the SOPs are not followed, medication produced by Genentech could be contaminated and "could hurt somebody." (*Id.*)

### **C. Prieto's Violation Of The SOPs Was An Egregious And Terminable Offense**

Given Prieto's extensive training and his admitted understanding of the SOP and GMP department, his conduct was particularly egregious to SBM. Contrary to the General Counsel's claims, Prieto was not being forthright by telling SBM that he had not cleaned lab rooms inside the Blue Room when SBM asked him if he had forgotten to sign the pass through log—he was trying to avoid discipline. (Tr. 1018-1019; 1023-1024 1112-13; 1264-1265.) Prieto told Brodie that he did not forget to sign the pass through log because he never entered the rooms in question to clean them so that he would not be disciplined.<sup>6</sup> It was not until after Brodie showed Prieto his signature on the cleaning logs indicating that he had in fact cleaned the lab rooms that Prieto then told Brodie that Lazo had told him to sign the log books. (Tr. 1113.) After a thorough investigation, SBM terminated Prieto for falsifying a log book and for providing false information by claiming that

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<sup>6</sup> If Prieto had not cleaned the lab rooms inside the Blue Room, then he could not be in trouble for failing to sign the pass through log, which must be completed prior to entering the lab rooms.

Lazo told him to complete the log book. SBM's conclusions were consistent with Lazo's version of events, the lead Prieto tried to blame for the falsification. (Tr. 977-978; Tr. 1259-1265; RX 46.) The ALJ credited Lazo's, not Prieto's testimony because Prieto's version was simply not believable. (ALJD 27:18; 31:27-28.)

The record evidence clearly shows that the act of signing a log book representing that a cleaning was completed, when it in fact had not been completed, has consistently been treated as a willful falsification by SBM because the employee knew he or she had not completed the cleaning, but signed the log book anyway. The very definition of falsification is "the act of falsifying information." The General Counsel's claim that SBM "escalated" Prieto's conduct to falsification to justify Prieto's suspension and/or termination is ludicrous—Prieto falsified information by creating an entry in a log book for work that he did not do.

Neither the General Counsel, nor the ALJ, can cite to another incident where a GMP employee who signed a log book but did not perform the cleaning received lesser discipline. The only comparable incident involved former employee Veronica Barajas. (R. Exh. 90.) The General Counsel admits that Barajas also signed a log book, but did not complete the cleaning. SBM terminated Barajas for her conduct. More importantly, SBM terminated Barajas even though she was not a union representative or shop steward and had not engaged in any union activities in the months leading up to her termination. SBM's termination of Barajas is demonstrative proof that it would have terminated Prieto regardless of his union activities.

The General Counsel's claim that Barajas' situation is distinguishable because she "continued to lie" when first confronted with the issue, while Prieto quickly stated that he had not cleaned the rooms lacks merit. As discussed above, Prieto was attempting to avoid discipline regarding the pass through log when he answered that he had not cleaned the rooms. In any event, both employees signed Genentech log books representing that they had completed cleanings when,



in fact, they had not. Both employees had unacceptable explanations as to why they had made such representations given their extensive GMP training. The General Counsel's additional claim that Prieto's apparent confusion excused his conduct compared to Barajas' conduct also lacks merit—Prieto's explanations were not credited by the ALJ or SBM. If Prieto had not performed work in a particular area, then he should not have signed the log book at all.

The General Counsel's claims that Prieto's violation was minor because SBM characterized Prieto's conduct as "human error" is also patently false. The statement to which the General Counsel cites, found on Exhibit 79, refers to a violation by Giovanna Loli, not Prieto, on the same date.<sup>7</sup> Loli failed to sign a pass through log prior to entering the same labs that Prieto represented that he had cleaned; Loli, however, had cleaned the rooms. The General Counsel's blatant misrepresentation of the documentary evidence is unacceptable and should be disregarded.

Finally, there is no dispute that SBM's policies support Prieto's termination. SBM's policies against Unacceptable Conduct clearly state that falsification or misrepresentation of information by an employee "can result in immediate termination." There is no dispute that Prieto falsified information and attempted to place the blame on another employee, Lazo.

**D. Respondent's Disciplinary Records Show That Prieto Would Have Been Terminated Regardless Of Any Union Activities**

Contrary to the General Counsel's claims, SBM's disciplinary records further establish that SBM has been consistent in disciplining employees for various types of log book violations. The General Counsel's allegation that the "rules surrounding the GMP area are not so strictly enforced in practice" is disproven by the very evidence cited the General Counsel.

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<sup>7</sup> The reference to "human error" refers to Giovanna Loli: "Human error caused this event. Campus services personnel Unix ID lolig [Giovanna Loli's ID] who performed the daily floor cleaning . . . but that she failed to document passing in the equipment on the FN1989." (R. Exh.79, p. 2.)

For example, the General Counsel lists employees such as Jose Davila, Henry Rodriguez, Jesus Canaveral and Cesar Menjivar as receiving only verbal or written warnings for their infractions within the GMP department. (Answering Brief, p. 23.) Each of these infractions are easily distinguishable because their violations were minor and did not involve any type of falsification. Jose Davila and Henry Rodriguez were issued verbal warnings for failing to perform a weekly or monthly cleaning of a particular area—both employees did not complete their log book entries because they missed their cleanings. (GC Exhs. 110, 128.) Cesar Menjivar was issued a written warning for failing to follow all proper sterile gowning procedures.<sup>8</sup> (GC Exh. 120.) Menjivar performed some, but not all of the procedures pursuant to the SOP. If anything, Menjivar’s write up demonstrates just how particular the GMP rules are. Menjivar was written up, among other things, for “only sanitizing the inside of his hands and not the entirety of the hands including in between fingers and back of hands.” (*Id.*) Jesus Canaveral accidentally signed an entry in a log book meant for a “verifier” (someone who verifies that the cleaning was done). (GC Exh. 109.) In other words, Canaveral completed the cleaning, signed the log book documenting that he performed the cleaning, but also signed in a space meant for a different individual to verify his work. Because none of the above infractions involved the falsification of any paperwork, the discipline issued above followed SBM’s progressive discipline policy. Indeed, as the General Counsel has pointed out, Cristo Cerrato was suspended following multiple back to back documentation infractions in the GMP department pursuant to SBM’s progressive discipline policy. SBM disciplined each of the above employees consistent with company policy.

The General Counsel’s claim that SBM does not address “falsification” with severity is also unsupported by the evidence. (Answering Brief, p. 24.) Contrary to the General Counsel’s claims, Donald Manzanares did not falsify any information. Manzanares had completed a cleaning, but

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<sup>8</sup> The General Counsel’s representations that Menjivar did not perform any sterile gowning is inaccurate and false.

forgot to document the log book immediately after completing the cleaning as required by the SOPs. (Exh. 118.) SBM suspended Manzanares and removed him from the GMP department for documenting the log book *three days after* he completed the cleaning. (*Id.*) The General Counsel's claim that Manzanares' conduct is equivalent to Prieto's is incorrect and demonstrates a lack of understanding of SBM's policies. (*Id.*) Manzanares did not falsify any information—he documented a log book to show that he had completed a cleaning, but failed to document the log *on the same date of* the cleaning as he was required to. (*Id.*) The fact that Genentech required SBM to remove Manzanares for his infraction further supports the necessary action it needed to take against Prieto for actually falsifying information. (Exh. 118, p. 3.)

SBM rightfully terminated Prieto for falsifying Genentech's log books and attempting to place the blame on another employee, Jose Lazo. The discipline issued by SBM to other employees that was cited by the General Counsel demonstrates that SBM has consistently terminated employees who falsify Genetech's log books. The General Counsel has no evidence to the contrary. The ALJ's decision with respect to Prieto should be reversed.

### **CONCLUSION**

For all of the foregoing reasons, and the reasons outlined in SBM's Exceptions and Memorandum in Support of Its Exceptions to the ALJ's Decision, the ALJ erred in finding for the General Counsel. Both Quintanilla and Prieto's charges should be dismissed.

Respectfully submitted,

SEYFARTH SHAW LLP

/s/ Nick G. Geannacopulos

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Attorney for Respondents

## **CERTIFICATE OF SERVICE**

The undersigned certifies that she caused a true copy of the foregoing RESPONDENT'S REPLY IN SUPPORT OF EXCEPTIONS TO THE ALJ'S DECISION to be filed electronically through the National Labor Relations Board's E-filing system on January 19, 2018 and that he caused to be served by email, on the same day, RESPONDENT'S REPLY IN SUPPORT OF EXCEPTIONS TO THE ALJ'S DECISION upon the following:

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